

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

IA 280 & 281 OF 2013

IN

DFR No.1153 OF 2013

Dated: 05th Sept, 2013

**Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,
CHAIRPERSON
HON'BLE MR. V.J. TALWAR, TECHNICAL MEMBER**

In the Matter of:

**Yantra eSolar India Private Limited.,
Plot No.1303 & 1304,
SY No.11/27, Khanamet,
Hi-Tech City, Ayyappa Society,
Madhapur,Hyderabad-81,
Andhra Pradesh**

..... Applicant/Appellant

Versus

- 1. Gujarat Urja Vikas Nigam Ltd.,
Sardar Patel Vidyut Bhawan,
Race Course,
Badodara-390 007**
- 2. Gujarat Energy Development Agency,
4th Floor, Block No.114/2,
Udyog Bhavan, Sector-11,
Gandhinagar
Gujarat**
- 3. Gujarat Electricity Supply Company Limited,
1st Floor, Neptune Tower,
Opp Nehru Bridge,
Ashram Road,**

Ahmedabad-380 009

..... Respondent(s)

Counsel for the Appellant : Mr. Vikas Singh, Sr.Adv.
Mr. Gaurav Mathur
Mr. S.P.Jha

Counsel for the Respondent(s):

ORDER

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON**

1. M/s. Yantra eSolar India Private Limited is the Applicant/Appellant herein.
2. Challenging the validity of the impugned order passed by the Gujarat State Commission dated 27.1.2012 whereby the Petition filed by the Applicant/Appellant for extension of control period fixed earlier for Solar Power Project was dismissed, the Applicant/Appellant has filed this Appeal.
3. Since, the Appeal was filed on 29.5.2012, as against the impugned order dated 27.1.2012, there was a delay of 478 days in filing. The Registry had noticed some defects. Therefore, through the letter dated 4.6.2013, the Registry pointed out to the Applicant/Appellant various defects and asked the Applicant/Appellant to cure the defects and re-file the Appeal within time stipulated. However, it was not

rectified in time and there was a delay of 68 days in re-filing the Appeal.

4. Therefore, the Applicant/Appellant filed two Applications in IA No.280 and 281 of 2013 to condone the delay of 68 days in re-filing the Appeal and also to condone the delay of 478 days in filing the Appeal.
5. We have heard the Learned Counsel in these Applications.
6. The learned Senior Counsel elaborately submitted that there was a delay of 478 days in filing the Appeal as well as the delay of 68 days in re-filing the Appeal for valid reasons and hence the same may be condoned by imposing cost on the Applicant/Appellant to be given to some charitable organisation as is normally done by this Tribunal while condoning the delay in filing the Appeal.
7. Let us first refer to the explanation given by the Applicant in the Application to condone the delay of 478 days in filing the Appeal.
8. The gist of the explanation given by the Applicant/Appellant in filing the Appeal is as under:
 - (a) The Applicant filed a Petition before the Gujarat State Commission for extension of control period fixed under the earlier order for Solar Power Project since the commissioning of the Applicant's project was

delayed beyond the stipulated date of expiry of the control period due to the reasons which were beyond the control of the Applicant.

(b) The Gujarat State Commission dismissed the same by the impugned order dated 27.1.2012.

(c) The Applicant set up a Solar Photovoltaic Power Plant in the Gujarat Solar Park in District Patan, Gujarat.

(d) The State Commission by the order dated 29.1.2010, fixed the tariff for purchase of Solar Energy by the Distribution Licensees and fixed the Control Period for applicability of the tariff order to be two years. As per this order, the Control Period of the Tariff Order was to expire on 28.1.2012. Thereupon, the Applicant executed a Power Purchase Agreement dated 9.12.2010.

(e) As per this Agreement, the Scheduled Date for Commercial Operation was on 31.12.2011. When the PPA was executed between the Applicant and the Gujarat Urja, the Applicant was unable to acquire the land and commence its work as there were numerous disputes with respect to the demarcation of boundaries.

(f) Even around 31.12.2011, the expiry of Control Period under the PPA, the Applicant could not complete the project and commence the Plant. The Applicant requested Gujarat Urja to consider the extension of the Control Period. However, the Gujarat Urja did not consider the request of the Appellant. Therefore, the Applicant/Appellant filed a Petition in Petition No.1160/11 before the State Commission to direct the Distribution Licensee to extend the Control Period without levy of liquidity damages.

(g) Some other parties, who were similarly placed, also filed similar Applications before the State Commission seeking for the extension of the Control Period.

(h) The State Commission combined all the Applications where the extension of Control Period was sought and decided the matters by way of a common Impugned Order. Through the impugned order dated 27.1.2012, the State Commission dismissed the Petition filed by the Applicant/Appellant on the ground that the State Commission cannot extend the Control Period for some project developers including the Applicant/Appellant unless state-wide ramifications were shown.

(i) In view of the dismissal order, the Applicant was concentrating on expeditious completion of the project with a view to avoid continuing liquidated damages of Rs.15,000/- per day of delay. Thus, the Applicant considered it expedient to first complete and commission the project. Hence, the Applicant did not chose to challenge the impugned order immediately.

(j) Thereafter, the project was completed and the commissioning was done on 23.10.2012. The Applicant also obtained a certificate of commissioning dated 23.11.2012.

(k) In the meantime, two other parties namely M/s. Sunkon Energy Pvt Limited and Solar Semi-Conductor Power Company India Pvt Limited filed Appeals before this Tribunal as against the impugned order dated 27.1.2012 in Appeal No.96 of 2012 and 130 of 2012 respectively. This Tribunal allowed these Appeals by the common order dated 2.1.2013 and remanded the matter back to the State Commission for re-hearing the matter on merits of each individual case.

(l) In pursuance of the said remand order, the State Commission had taken-up the Petitions filed by those parties for re-hearing those matters. On coming to know of this, the Applicant/Appellant decided to

challenge the impugned order dated 27.1.2012 in order to get the same fruits which were obtained by the parties which were similarly placed after a delay of 478 days.

(m) Since the delay was occasioned on account of the fact that the Applicant/Appellant was first concentrating to complete its project and commission it without any further delay, the delay which may be huge, may be condoned as payment of cost and the Applicant's case also may be directed to be re-heard by the State Commission on merits along with others."

9. On going through the explanation offered in the Affidavit for condonation of the delay, it is evident that though the Applicant/Appellant was aggrieved by the impugned order that was passed on 27.1.2012 rejecting the prayer for extension of control period, the Applicant decided to complete and commission the project and decided not to challenge the impugned order.
10. As per the Affidavit, the project has been completed now and the Applicant obtained the certificate of commissioning on 23.11.2012. So up to this date, the Applicant/Appellant has taken steps to file the Appeal as against the impugned order dated 27.1.2012. Even after commissioning, the Applicant did not pursue the matter. Only after coming to

know that the Appeals filed by other parties were allowed by the Tribunal and the matter was remanded to the State Commission for re-hearing on merits, the Applicant decided to file the similar Appeal before this Tribunal to obtain the similar order. It is also noticed that even though such order was passed on 2.1.2013 by the Tribunal, the Appeal has been filed only on 29.5.2013.

11. There are two aspects to be noticed in this context.

- (a) Immediately, after the impugned order was passed on 27.1.2012, the Applicant/Appellant decided not to challenge the said order by filing the Appeal. On the other hand, the Applicant considered it expedient to first complete and commission the project rather than challenging the impugned order. From this, it is clear that the Applicant/Appellant had earlier decided not to challenge the impugned order.
- (b) The Applicant/Appellant decided to file the Appeal only after coming to know that the Appeals filed by other parties were allowed and the matter was remanded back to the State Commission for re-hearing. So, the change of mind to file an Appeal after a long time, was due to the reason that the Appeals filed by other parties have been allowed by this Tribunal. This shows that if those Appeals were not allowed, the

Applicant/Appellant would not have decided to file the Appeal. Now, the present decision to file an Appeal is nothing but “Fence sitting.”

- 12.** Both these aspects would indicate that the Applicant/Appellant was earlier not interested in filing the Appeal but later decided to file the Appeal due to the Remand order passed by this Tribunal in favour of other parties.
- 13.** That apart, it is noticed that even after the remand order was passed on 2.1.2013, the Applicant/Appellant has chosen to file the Appeal only on 29.5.2012 i.e. after five months. This delay also has not been explained.
- 14.** In view of the above, the explanation offered in the Application to condone the enormous delay of 478 days was not only unsatisfactory but also would show the attitude of the Applicant who had decided not to file the Appeal earlier but changed his mind only after the remand order was passed by this Tribunal. Even thereafter, there is a considerable delay which has not at all been explained. So, this change of decision to file the Appeal on the basis of the remand orders that too belatedly cannot at all be a ground to show that there is sufficient cause to condone the delay. Therefore, the Application to condone the enormous delay of 478 days in filing of Appeal is liable to be rejected.

15. In view of the rejection of the Application to condone the delay in filing the Appeal, the explanation offered for condonation of delay in re-filing, needs no consideration. However, it is to be pointed out that the attitude of the Applicant/Appellant in not re-filing the Appeal within the stipulated time specified by the Registry and re-filing only after a delay of 68 days on the reason that the Counsel for the Appellant was out of station and the Applicant could not engage other counsel during the summer vacation for re-filing the Appeal does show the lack of diligence. This would also show that the Applicant/Appellant was not only not interested in filing the Appeal in time but also the Appellant did not take care at least to re-file the Appeal in time.
16. In view of the above, the Application to condone the delay in re-filing is also liable to be rejected.
17. Accordingly, both the Applications for condonation of delay dismissed.
18. Consequently, the Appeal is also rejected.

(V.J. Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 5th Sept, 2013

✓ ~~REPORTABLE/NON-REPORTABLE~~